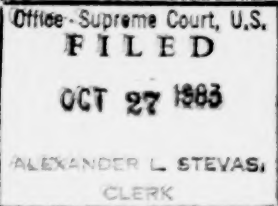


No. 83-108



In the Supreme Court of the United States

OCTOBER TERM, 1983

MARY F. SHOPE, EXECUTRIX OF THE ESTATE OF
GEORGE W. SHOPE, DECEASED, PETITIONER

v.

MARGARET M. HECKLER, SECRETARY OF
HEALTH AND HUMAN SERVICES

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT*

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
*Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217*

TABLE OF AUTHORITIES

Page

Cases:

<i>Boddie v. Connecticut</i> , 401 U.S. 371	3
<i>Califano v. Sanders</i> , 430 U.S. 99	3, 4
<i>Schweiker v. Hansen</i> , 450 U.S. 785	4
<i>Weinberger v. Salfi</i> , 422 U.S. 749	2

Statute and regulation:

42 U.S.C. (& Supp. V) 405(g)	2, 3
20 C.F.R. 404.933	2

Miscellaneous:

U.S. Dep't of Health, Education, and Welfare, Social Security Administration, DHEW Pub. No. (SSA) 77-10282 (BHA-1), <i>Right to Appeal Under Social Security and Medicare</i> (Feb. 1977)	3
--	---

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-108

MARY F. SHOPE, EXECUTRIX OF THE ESTATE OF
GEORGE W. SHOPE, DECEASED, PETITIONER

v.

MARGARET M. HECKLER, SECRETARY OF
HEALTH AND HUMAN SERVICES

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT*

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner brings this action on behalf of her deceased husband, who had claimed Social Security disability benefits. Petitioner contends that the dismissal of her husband's untimely request for an administrative hearing, which she alleges was filed late through the fault of the local Social Security office, constituted a denial of due process.

1. Petitioner's husband filed an application for disability insurance benefits on August 8, 1977. The application was denied initially on August 30, 1977, and again on reconsideration on March 10, 1978, on the ground that the claimant had not met the earnings requirement (Pet. App. 6a). The claimant then filed amended tax returns with the Internal Revenue Service that, if credited for Social Security purposes, would have given him the required coverage (Pet. 3). He requested reconsideration, but the Secretary of Health

and Human Services denied the request on October 6, 1978, on the ground that the claimant had failed to "substantiate the validity" of the newly reported self-employment income (*ibid.*).

The claimant told the local Social Security office that he wanted a hearing, but he did not file the written request required by regulation (see 20 C.F.R. 404.933) until two years later, on December 15, 1980 (Pet. App. 7a). An administrative law judge (ALJ) dismissed the request as untimely (*id.* at 8a). The ALJ also found that the claimant had failed to show good cause to extend the time for requesting a hearing, despite a statement by an employee in the local office that the claimant had made a timely oral request for a hearing and that it was the office's fault that a written request had not been submitted earlier (*ibid.*). The claimant died on May 3, 1981, and petitioner was substituted on his behalf. In August 1981, the Appeals Council affirmed the dismissal (*ibid.*).

In October 1981, petitioner brought this suit against the Secretary in the United States District Court for the Western District of North Carolina, seeking review of the refusal to grant him a hearing on his claim for benefits. The district court dismissed the suit for lack of jurisdiction (Pet. App. 5a-10a(v)). The court explained that petitioner was not seeking review of a "final decision[] * * * made after a hearing," as required by 42 U.S.C. (& Supp. V) 405(g) (Pet. App. 10a-10a(v)). The court of appeals affirmed in an unreported per curiam opinion (*id.* at 1a-2a(i)).

2. The gravamen of petitioner's action is that the Secretary abused her discretion by denying the claimant's untimely request for a hearing because there was in fact good cause for the untimeliness. See Pet. App. 10a(iv). The district court correctly held, however, that such a claim does not fall within the jurisdictional grant of 42 U.S.C. (& Supp. V) 405(g). See *Weinberger v. Salfi*, 422 U.S. 749 (1975). In

Califano v. Sanders, 430 U.S. 99, 107-108 (1977), this Court explicitly held that Section 405(g) "cannot be read to authorize judicial review of alleged abuses of agency discretion in refusing to reopen claims for social security benefits."

Sanders left open the possibility of judicial review of constitutional questions that do not strictly meet the language of Section 405(g), noting that such questions "obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." 430 U.S. at 109. Petitioner's efforts to bring her lawsuit within this rule, however, are unavailing. Due process does not confer an *unconditional* right to a hearing, only the opportunity for a hearing. The right may be forfeited by failing to comply with a procedural requirement to make a timely written request. See *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). It is undisputed that the Secretary does afford a right to a hearing if a timely written request is made. It also is undisputed that petitioner's husband did not file a written request for a hearing until *two years* after the denial of his claim for benefits, well beyond the authorized period, although he could have filed the request in a timely fashion.¹ The Secretary is not estopped from insisting on compliance with this valid regulation because petitioner's husband may

¹ Petitioner reprints (Pet. 4) the Reconsideration Determination notifying her husband of his right to request a hearing, thus implying that he had no notice that a written request was necessary. Petitioner does not reprint, however, the "enclosed leaflet" referred to in the Reconsideration Determination as containing a full explanation of the right to appeal. In fact, the leaflet enclosed with Reconsideration Determinations as a matter of practice in 1978, DHEW Publication No. (SSA) 77-10282 (BHA-1), explicitly states that the procedure for requesting a hearing is either "filling out a 'Request for Hearing' form" available at a local Social Security office or "writing a letter to your social security office." See U.S. Dep't of Health, Education, and Welfare, Social Security Administration, *Right to Appeal Under Social Security and Medicare* 3 (Feb. 1977).

have been given erroneous advice by a Social Security employee. *Schweiker v. Hansen*, 450 U.S. 785 (1981). While petitioner may have a legitimate claim that the procedural requirement should be waived for "good cause" in this case, this is not one of those "rare instances" (*Califano v. Sanders*, 430 U.S. at 109) where the claim is constitutionally based. Accordingly, Congress has committed the resolution of such a non-constitutional claim to the discretion of the agency, not the courts.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

OCTOBER 1983